Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-70

ANTHONY DRAGOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MICHAEL D'ALESSIO, JR.,
Attorney for Petitioner,

19 Hutton Avenue,
West Orange, New Jersey 07052
(201) 736-1500

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

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APPENDIX

Appendix A 1a

IN THE

SUPREME COURT OF THE UNITED STATES

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No.

ANTHONY DRAGOS,

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To the Honorable, The Chief Justice and
the Associate Justices of the
Supreme Court of the United States,

Your petitioner, Anthony Dragos, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on July 3, 1979 which judgment affirmed a judgment of sentence of the United States District Court for the District of New Jersey filed November 20, 1978.

CITATION TO OPINIONS BELOW

Petitioner's sentence and conviction were affirmed by an unreported opinion of the Court of Appeals for the Third Circuit which is reproduced in Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered in lieu of formal mandate on July 3, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is a warrantless search of a motor vehicle (truck) permissible absent the exceptions to the rule requiring a warrant when there is probable cause to believe that the vehicle contains evidence of a crime and the justification for the search arose "suddenly and unexpectedly" when, in fact, the vehicle was secured and there would have been time to apply for the issuance of search warrant?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

On May 12, 1978 special agents of the FBI conducted a surveillance in the vicinity of the Term Rent-a-Car lot on Highways 1 and 9 in the City of Newark, New Jersey during the early afternoon. Special agents of the FBI observed a Ryder rental truck along with three smaller

trucks parked in a line in the rear of the parking lot of the aforementioned premises. Thereafter they observed a late model Ford Econoline van back alongside the Ryder rental truck in the lot. The agents saw an unknown individual open the back of the Ford van and another individual known to them as Anthony Dragos, the petitioner herein, remove cartons from the Ryder truck and load them into the Ford van. Agents saw the unknown individual drive away in the Ford van and head toward the entrance of the lot. One of the agents followed that truck, stopped it and brought it back along with the driver to the lot. The driver of that truck was identified as Eugene Zimmerman who was ultimately to become a co-defendant of the petitioner. A discussion ensued between the special agents and Zimmerman out of the presence of the petitioner whereupon the agents called the Port of New York Authority Police after identifying the cartons as containing lobsters. The special agents of the FBI did not know of any thefts of lobsters at that time and the Port Authority Police had no knowledge either of any thefts but suggested the agent call Frigid Express Company because they are known to import seafood and lobsters into that area.

After that telephone call it was determined they in fact were missing lobsters with markings on the cartons similar to those found in the Ford van driven by Zimmerman.

No arrests were made at that time but a complete search of the Ford van and the Ryder rental truck which the petitioner had been seen unloading within the confines of Term Rent-a-Car was made and lobsters were recovered which were later determined to have been stolen from Frigid Express.

The petitioner was indicted by the Grand Jury for the District of New Jersey for conspiracy and receiving goods

stolen in an interstate shipment. A motion to suppress evidence was filed and it was argued before the District Court that no valid exception to the general rule requiring a search warrant existed in the case at bar which would permit the search and seizure of the goods.

It was conceded by the District Court that there was no probable cause to arrest Eugene Zimmerman and bring him and the Ford van back to the Term Rent-a-Car lot where the second search of the Ryder truck was undertaken. The Court did find, however, that there were exigent circumstances present permitting the search of the Ryder rental truck. The exigent circumstances present which the Court found was the basis for the warrantless search was the fact that the lobsters were in fact perishable goods. That because lobsters in a frozen condition are highly perishable goods, the Court determined that that alone was a sufficient exigency to justify a search. A review of the record, however, reveals that there was no testimony concerning whether or not the goods were in fact refrigerated on ice or in any other condition wherein arguably they were in fact frozen nor was there any record of any indication of any deterioration or destruction of these goods. In fact the exigency discussed by the District Court referred to the condition of the goods and not to the circumstances surrounding the search which traditionally has formed the exception to the general warrant rule.

The United States Court of Appeals for the Third Circuit affirmed the finding of the District Court on the basis of *United States v. Milhollan*, — Fed. 2nd — 3d Cir. March 12, 1979 setting forth the rule that when the justification for a search arises suddenly and unexpectedly there is no requirement that a warrant be applied for.

It was further argued before the District Court that the petitioner did in fact have standing to move to suppress the evidence in question since it was conceded by the government that he did have in fact a lease hold interest in the truck and was in fact seen unloading the truck giving rise to a proprietary and certainly possessory interest in the goods found. The District Court and the Court of Appeals cited *Rakas v. Illinois*, 47 U.S.L.W. 4025 (U.S. Sup. Ct. December 5, 1978).

REASONS FOR GRANTING THE WRIT

There are two reasons Writ of Certiorari should issue in the case at bar. First, in both the state courts and the federal courts the doctrine of *Rakas v. Illinois, supra,* would seem to need some clarification since many of the courts have virtually taken a position that unless a defendant owns the property or vehicle which was searched, he or she has no standing to file motions and suppress evidence on the exclusionary rule of the Fourth Amendment. Clarification of the *Rakas* doctrine is needed as can be seen by the facts in the case at bar.

Second, under the case of *United States v. Milhollan, supra,* there would seem to have been carved out of the general rule requiring a warrant a sixth exception which concisely stated amounts to a permissible warrantless search when the justification for the search arises suddenly and unexpectedly. This is not the same in quality or principle as the exigent circumstances exception. In the case at bar especially the exigent circumstances cited did not deal with the circumstances surrounding the search and seizure but in the character of the goods, that is, the perishability of the lobsters and the affirmance of the Court of Appeals were based on the necessity of the search arising suddenly and unexpectedly. It is clear from the facts in the case that the Ryder rental truck especially was in fact immobile, had never been seen driven nor was there any reason to assume or conclude that the truck was in any danger of being moved or the goods being in any way disposed of so as to change their evidentiary value. In fact the truck was within the confines of a lot and could have easily been secured until a search warrant could have been applied for and issued. The principle the petitioner seeks to invoke here is much the same as that this court discussed in *United States v. Chadwick,* 433 U.S. 1 (1977).

When none of the usual circumstances surrounding the automobile exception so-called to the general warrant requirement are present there is no reason why the principle of *United States v. Chadwick* cannot be applied.

Further, although it has been discussed in many cases there has never been a definitive opinion setting forth the principle that a search warrant must be obtained when the circumstances permit an application to a United States Magistrate. All too often law enforcement authorities and in fact courts both in the state and the federal jurisdictions have taken the position that there are in fact six ways to permit the admissibility of evidence seized by law enforcement authorities: The five exceptions to the general rule requiring a warrant and the issuance of a warrant. While it has been made clear that there are not six methods by which one can justify a search, but only one, that is a search warrant. There has been no definitive ruling making it clear that the exceptions to the general rule are just that and not alternate methods of permitting the admissibility of seized goods.

Further in view of the holding of this court in *Rakas,* it would seem now that someone who is not the owner of a motor vehicle but against whom evidence will be sought to be admitted at a trial, had in the situation where law enforcement authorities do not take the time and trouble to apply for a search warrant, that defendant has little or no protection under the Fourth Amendment. Clarification of this anomalous rule is urgently needed.

For these reasons Certiorari should be granted in the case at bar.

Respectfully submitted,

/s/ Michael D'Alessio, Jr.
MICHAEL D'ALESSIO, JR.
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2620

UNITED STATES OF AMERICA

vs.

DRAGOS, ANTHONY,

Appellant.

(D.C. Crim. No. 78-00150-02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS and ROSENN, Circuit Judges and LAYTON, Senior, District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on June 5, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 20, 1978, be, and the same is hereby affirmed.

DATED: June 11, 1979.

ATTEST:
Clerk

Honorable Caleb R. Layton, III, United States District Court for the District of Delaware, sitting by designation.

Certified as a true copy and issued in lieu
of a formal mandate on July 3, 1979.

Test:
Chief Deputy Clerk,
U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2620

UNITED STATES OF AMERICA

vs.

ANTHONY DRAGOS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.F. CRIM. No. 78-00150-02)
SUBMITTED UNDER THIRD CIRCUIT RULE 12(6)
JUNE 5, 1979
BEFORE: ADAMS AND ROSENN, CIRCUIT JUDGES AND
LAYTON, SENIOR DISTRICT JUDGE*

MICHAEL D'ALESSIO, JR.
Wilson and D'Alessio, Jr.,
West Orange,
New Jersey 07052
Attorney for Appellant

ROBERT J. DEL TUFO,
United States Attorney,
RALPH A. JACOBS,
Assistant U.S. Attorney,
Newark, New Jersey 07101
Attorneys for Appellee

OPINION OF THE COURT

(Filed June 11, 1979)

PER CURIAM.

Appellant, Anthony Dragos, and two co-defendants were charged with offenses arising out of their possession

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* Honorable Caleb R. Layton, III, United States District Court for the District of Delaware, sitting by designation.

of 333 cases of stolen lobster tails worth $60,000. Dragos moved to suppress evidence obtained by FBI agents as a result of searches of a Ford van and a large Ryder rental truck. When his motion was denied, Dragos entered a conditional plea of guilty, preserving the right to appeal the suppression ruling. Because the exclusionary rule does not require that the evidence in question be suppressed, we affirm.

On Monday, May 15, 1978, FBI agents, acting upon an informant's tip, conducted surveillance of activities at the parking lot of Term Rent-a-Car in Newark, New Jersey. At about 2:20 P.M. the agents saw a man, later identified as Eugene Zimmerman, arrive in a Ford van. He and Dragos then began loading cartons of lobster tails into the Ford van from a Ryder rental truck that was parked in the lot. After loading fifty cartons into the van, Zimmerman drove off, followed by two agents. When Zimmerman stopped the van and transferred one carton to the trunk of a nearby car, the agents approached, identified themselves, and told Zimmerman that they were investigating a theft of lobster tails. From their vantage point, the agents could see clearly into the van through the open rear door and could read the name of the importer on the cartons containing the lobster tails. Following a brief discussion, Zimmerman agreed to accompany the agents back to the rent-a-car office.

Meanwhile, Dragos, closed the overhead door of the Ryder truck and walked into the rent-a-car office, followed by an FBI agent. When the agent identified himself to the office manager, Dragos departed hastily. After denying that he knew Dragos or the contents of the trucks, the office manager consented to a search of the office and his nearby mobile home. When agents discovered more than a case of lobster tails on the premises, the manager admitted that Dragos had given him the lobster tails.

By that time Zimmerman and the other agents returned to the rent-a-car office. The agents were able to ascertain, by placing a number of phone calls, that a shipment of lobster tails had been stolen the previous Friday from Frigid Express Company. They thereupon searched the Ford van and the Ryder truck, without a search warrant, and recovered from them a total of 333 cases of lobster tails. Dragos was subsequently arrested.

The district court ruled that Dragos lacked standing to contest the legality of the warrantless search of the Ford van in the rent-a-car lot. Moreover, the district court held that, even if Dragos had standing and it were determined that the search was unconstitutional, evidence pertaining to the contents of the Ford van was properly admissible because the lobster tails cartons were clearly visible to the agents when they earlier approached the van. We need not develop, by a lengthy analysis, whether Dragos, who is alleged to have been the lessee of the Ford van and in possession of the cartons at the time they were transferred from the truck to the van, may raise a fourth amendment challenge to the search of the van after *Rakas v. State of Illinois*, 47 U.S.L.W. 4025 (U.S. December 5, 1978). For it is apparent, as the district court determined, that the plain view observations of the agents regarding the contents of the van are admissible. *See, e.g., Ker v. California*, 374 U.S. 23, 43 (1963).

With respect to the search of the Ryder truck, the district court ruled that probable cause existed to search for and seize the lobster tails, and that under the line of precedent regarding vehicle searches the agents could conduct such a search without first obtaining a warrant. As we recently observed in *United States v. Milhollan*, — F.2d — (3d Cir. March 12, 1979), so long as there is probable cause to believe that a vehicle contains evidence

of a crime, a warrantless search is permissible when the justification for the search arose suddenly and unexpectedly. We cannot say that the district court erred in concluding that probable cause existed, in view of the fact that at the time the truck was searched the agents knew that there had been a recent theft of lobster tails from Frigid Express, that fifty cartons had been loaded from the truck into the van, that these lobster tails were of the same brand that had been stolen from Frigid Express, and that Frigid Express is the sole importer of that brand. Nor can it be said that the district court erred in determining that the justification for the search arose suddenly and unexpectedly because the agents reasonably believed that cartons of lobster tails were in the truck. When such exigent circumstances as present here crop up, "the police need not freeze the situation while they secure a search warrant for the automobile," *Milhollan, supra*, — F.2d at —, slip opinion at 12, particularly where, as here, they are dealing with a perishable food commodity.

Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK:

Kindly file the foregoing per curiam opinion.

BY THE COURT:

DATED: